Supreme Court, U.S.
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No. 00-1667

IN THE

Supreme Court of the United States

GERTRUDE GREEN, as Administratrix of the Estate of Sol Green and Individually,

Petitioner,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, a Delaware Corporation, and CANTWELL & CANTWELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

PETITIONER'S REPLY BRIEF

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Rule:

Illinois Supreme Court Rule 277 6

Petitioner-Plaintiff Gertrude Green, as Administratrix of the Estate of Sol Green and Individually ("Mrs. Green"), submits her reply to Respondent-Defendant Merrill Lynch Pierce Fenner & Smith's and Cantwell & Cantwell's response in opposition to her Writ.

SUMMARY OF WHY RESPONDENTS' BRIEF SHOULD BE DISREGARDED

None of Respondents' opposition undercuts the sole issue, which remains squarely presented: whether a punitive judgment award which on its face violates *BMW v. Gore*'s due process standard may be attacked collaterally, here, against a punitive damage award at 40 times actual damages, originally obtained by default in a distant state against an elderly, impecunious individual, against which his elderly, poor widow could not afford to defend directly in the distant jurisdiction. In short, this case presents the issue of whether *Gore v. BMW*'s due process prohibition of excessive punitive damages cuts both ways, to protect individuals as well as merchants, and presents the record of due process denials that was lacking in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (December 11, 2000).

Respondents convey an inaccurate description of the record below and misconstrue the state laws that Respondents violated which led to their procurement of two facially invalid default judgments against an Illinois resident, the first secured in a distant California court that had no personal jurisdiction over Petitioner and the second, a foreign registration of the first, obtained without proper service to Petitioner's deceased husband, Sol Green, who was severely ill and who died four months after the purported service, and which were subsequently enforced against Petitioner through a judicial sale of her home.

In addition, Respondents' challenge of this Court's power to hear this appeal ignores the constitutional issues raised below and too broadly restricts this Court's ability to review and invalidate facially unconstitutional default judgments that are blindly given full faith and credit and preclusive effect by resident state courts.

RESPONDENTS' DISTORTED VERSION OF THE RECORD, ATTEMPTING TO CONCEAL THEIR PATENT DUE PROCESS VIOLATIONS, SHOULD NOT DISCOURAGE THIS COURT'S DECLARATION THAT FACIALLY INVALID DEFAULT JUDGMENTS FOR PUNITIVE DAMAGES MAY BE CHALLENGED COLLATERALLY.

I. RESPONDENTS' INACCURATE DESCRIPTION OF THE RECORD

To dissuade this Court from hearing this petition, Respondents attack the factual support of Petitioner's claims. Respondents assert that affidavits of Petitioners that are contained within the record "lacked credibility", are "controverted by Affidavits", are "totally incompetent", and "consisted in large measure of inadmissible hearsay". (Response brief, p. 3). In reading Respondents brief, one would think a trier of fact has already made factual determinations. But the record shows that after entry of the two default judgments, all subsequent courts held themselves bound by those facially invalid judgments and refused to determine the facts. The only opportunity afforded this elderly, poor widow was to traverse across the country to defend herself in California, an opportunity she attempted to do, but could not complete due to physical and financial limitations (R.C. 223, Petitioner's *pro se* California TRO action was dismissed for want of prosecution).

Respondents' contention that material factual determinations have been made by lower courts (Response at p. 15) is disingenuous and belied by the dispositions of those proc:edings. Respondents' contention is especially egregious in light of their vociferous objections to any investigation or determination of the facts before the Honorable Michael Hogan, the presiding judge of Mrs. Green's case against Respondents. For instance, during those proceedings and in response to Judge Hogan's question, "Do I have to have an evidentiary hearing?", counsel for Respondents, Mr. Scheuerlein, stated, "No, you don't, your honor." (R.C. 59).

Most egregious though is Respondents' argument that the California action "was not a simple breach of contract action". (Response at p. 3). An assertion that is belied by the record. Judge Hogan, who reviewed the parties' pleadings and heard extensive oral arguments on two separate occasions, found it to be "troublesome that on a $4,000 credit card claim that we're at this stage" (R.C. 646). Though Judge Hogan dismissed on purely legal grounds and, therefore, never formally entered findings of fact, he was the only judge that was presented with and heard factual disputes.

Equally disturbing is Respondents' assertion that their self-serving affidavits should be given more weight in the record than those supporting Petitioner. Though they do not expressly disclose it in their brief, the only affidavits raised in support of Respondents are those of Paul H. Scheuerlein and Peter A. Cantwell, who are attorneys with the law firm of Cantwell & Cantwell, a named Respondent and legal counsel for Merrill Lynch in this action.

The record shows that Respondents', not Petitioner's, factual support is questionable. Though Respondents attack the affidavit of Alison Boyd based on its lack of a signature, they fail to inform this Court that counsel representing Petitioner at the time filed an affidavit explaining that the Boyd affidavit existed but was misplaced. (R.C. 696). Boyd's signed affidavit, which fully comports with the affidavit in the record, has since been located and will be entered into the record at an appropriate time. Respondents' attack on the Boyd affidavit is obviously an attempt to mitigate the significance the statements contained therein have in showing the invalid nature of the default judgments. Ms. Boyd, a former officer of Moving Up International Corp., and one of the defendants in Merrill Lynch's California action, states in her affidavit that Sol's signature on the Merrill Lynch account was inadvertently placed there and that Sol had resigned from the Company a year prior to the opening of the Merrill Lynch accounts. (R.C. 697-98). Ms. Boyd's affidavit is credible in that the statements made therein exposed her to the risk that Merrill Lynch's inquiry would then be focused upon her.

Moreover, the record reflects Respondents' reckless and careless attitude for Mrs. Green's due process rights. The record shows that Mr. Scheurlein admits to not knowing, or even caring, whether Sol's purported signature on the credit card agreement, their only link of Sol to their default judgments, was truly Sol's. (R.C. 63 and 79).

II. RESPONDENTS' MISAPPLICATION AND DISTORTION OF APPLICABLE STATE LAW

In their brief, Respondents attempt to gloss over their gross manipulation of California and Illinois law by misapplying the law and misstating facts. Respondents' conclusory assertion that the "California Judgment fully comports with California law" (Response at p. 13) rests on their false contention that the California action against Sol was not simply a $4,000 credit card claim. But, as stated by the only judge willing to hear the facts, and as reflected in Merrill Lynch's complaint against Sol, the only plausible claim against him was on the credit card, and only because he purportedly signed the application agreement, not because facts existed to show that he benefitted from use of the card. Consequently, the entry and enforcement against Sol Green alone of the entire default judgment that included, in addition to the credit card claim, $50,000 in punitive damages, a $20,450 purely corporate debt and attorney fees and costs of approximately $10,000 (an approximately 40 to 1 ratio to purported damages), clearly violated both California law, as explained in Mrs. Green's petition, and due process protections raised in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). Rights which no court thus far has afforded her an opportunity to vindicate.

Though Respondents make a greater effort in arguing that they did not violate Illinois law by issuing a Citation to Discover Assets simultaneously with the filing of a Petition for Registration of Foreign Judgment, their argument here is both factually and legally wrong. (Response at p. 11). In their brief, Respondents justify initiating these proceedings concurrently by citing to Illinois' Uniform Enforcement of Foreign Judgments Act, which at the time expressly allowed for both a Levy and Registration of Foreign Judgment to occur at the same time.

However, the fallacy of Respondents' argument is their misstatement of the undisputed facts. The issue here is not whether Merrill Lynch could have proceeded with a levy, something it never pursued during this relevant time. Rather, the issue is whether Merrill Lynch complied with Illinois law in simultaneously pursuing the registration of its foreign judgment at the same time it pursued the citation to discover assets.

At all relevant times, Illinois law recognized a levy to be separate and distinct from a Citation to Discover Assets. *Cf*, Ill. Rev. Stat (1989), ch. 110, paras. 12-601(c), 12-606, 12-110 and 12-111 (addressing levies); *with* Ill. Rev. Stat (1989), ch. 110, para.12-1402 (addressing citation to discover assets). In contrast to a levy, which only serves to seize control or create a lien on specific, identified property, a citation to discover assets is broader and more intrusive and serves to discover all available assets of the debtor. Moreover, the applicable Illinois Supreme Court Rule addressing the procedures with respect to Supplementary Proceedings, Rule 277, only lists section 12-1402 proceedings (i.e., citation to discover assets) as those that may "be commenced at any time [after] a judgment . . . is subject to enforcement". *See Elmhurst Auto Parts, Inc. v. Fencl-Tufo Chevrolet, Inc.*, 235 Ill. App.3d 88, 600 N.E.2d 1229 (2d Dist. 1992) (recognizing that "a supplemental proceeding under section 12-1402, including a citation to discover assets, . . . differs from an execution and levy"). Consequently, under Illinois law at the time in question, Illinois citation to discover asset proceedings could only begin after a final, enforceable judgment had been entered.

Significantly then, Respondents' improper initiation of the citation proceeding, which the record shows Petitioner participated in *pro se*, and which Respondents later voluntarily dismissed, assured that Petitioner would not take action against Merrill Lynch until it was too late. Respondents' later concealment of their misconduct before Judge Hogan, whereby they proclaimed to the court that their actions at the time were in compliance with Illinois law, (R.C. 31-32) served to dissuade the court from fairly assessing the facially invalid default judgments.

III. JURISDICTIONAL BASES EXIST FOR THIS COURT TO HEAR PETITIONER'S CASE

Respondents' assertion that Mrs. Green failed to raise express constitutional claims below is false as well. She has consistently asserted that Merrill Lynch's action and award against Sol and her home violated due process. Nonetheless, Respondents' argument completely ignores the thrust of Mrs. Green's petition, which asserts that the procurement of the facially invalid default judgment and the registration of that judgment by improper (or even fraudulent) means was unconstitutional, should not have been granted full faith and credit by Illinois courts, and is subject to collateral attack.

Instead of contesting this Court's jurisdictional power under Petitioner's aforementioned reasoning, Respondents instead devote all their attention to attacking Mrs. Green's factual bases and her allegations of Respondents' violations of state laws. In essence, Respondents seek to disingenuously recast the factual record into a version that would possibly leave doubt as to whether Mrs. Green's due process rights were violated. But the record clearly does not favor their position under their jurisdictional theory.

A. Jurisdiction Over This Case Rests in Addressing A Clear Violation of Fundamental Due Process Committed In The Entry And Enforcement of Facially Invalid Default Judgments

The general rule that an appellate court does not give consideration to issues not raised below should not be applied where the obvious result would be a plain miscarriage of justice. *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) (applying income tax laws not applied below); and *Singleton v. Wulff*, 428 U.S. 106, 121 (July 1, 1976) (*citing*, *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962) (refusing to require lower courts to review race discrimination violation where the Court found the violation was clear under the Court's prior decisions). Mrs. Green's case is one in which a clear miscarriage of justice has occurred, the loss of her family home based upon an unsupported allegation of a past due $4,000 credit card claim. The loss of her home is made more egregious by the fact that each of the courts below refused to revisit the facially unconstitutional default judgments, except if she traveled to a far-away jurisdiction at great expense. But as Merrill Lynch acknowledged when they sought to enforce the underlying judgment, the only asset Mrs. Green owned was the family home of approximately 50 years. (R.C. 800). Thus, this Court has the ability to address Respondents' entry and enforcement of a facially void judgment that violated the principle in *BMW v. Gore*, which was thereafter made even more unjust when the only opportunity afforded Petitioner to challenge the void judgment violated the due process principle in *Green Tree Financial*.

B. The Record Reflects That The Lower Courts Either Had Addressed Constitutional Issues or Refused to Hear *Any* Claims, Including Constitutional Ones

The record shows that Judge Hogan considered the possibility that Mrs. Green's fundamental rights of due process were being violated, thus providing the jurisdictional basis under even Respondent's theory. At the January 26, 1988 hearing on Respondents' motion to dismiss, Mr. Scheurelein stated that Petitioner's abuse of process claims were an:

> attempt to make an end run around the full faith and credit provisions of the United States Constitution. (R.C. 606).

Later on, Mr. Scheurelein argued that Petitioner's claims were a collateral attack on Respondents' facially invalid default judgments. (R.C. 644).

In response, Judge Hogan stated:

> What about just the sense of fairness argument that you have got a $4,000 credit card debt, and now, you know, 15 cases later and a sale of a home just seems to me —
>
> * * *
>
> Something has out of wack [sic]. (R.C. 645).

Though Judge Hogan was correct in concluding that a violation of fundamental fairness was being committed against the Green family, he was clearly wrong in dismissing the action as issue and claim precluded.

All other courts that Respondents refer to in their brief simply did not afford Petitioner the opportunity she deserved to attack the facially invalid default judgments. Instead, those courts simply presumed those judgments were valid.

CONCLUSION

For the foregoing reasons, Gertrude Green's petition for writ of certiorari should be granted.

Respectfully submitted,

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